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EXAMINER

HUANG, CHEN-LIANG

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRIAN M. O’CONNELL and KEITH R. WALKER

Appeal 2016-004234
Application 13/444,465¹
Technology Center 2400

Before KRISTEN L. DROESCH, JOHN A. EVANS, and
SCOTT B. HOWARD, *Administrative Patent Judges*.

EVANS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants seek our review under 35 U.S.C. § 134(a) of the
Examiner’s final rejection of Claims 1–22. Br. 5.

We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.²

¹ The Appeal Brief identifies International Business Machines Corporation as the real party in interest. Br. 3.

² Rather than reiterate the arguments of Appellants and the Examiner, we refer to the Appeal Brief (filed June 25, 2015, “App. Br.”), the Examiner’s Answer (mailed October 2, 2015, “Ans.”), the Final Action (mailed December 24, 2014, “Final Act.”), and the Specification (filed April 11, 2012, “Spec.”) for their respective details.

STATEMENT OF THE CASE

The claims relate to a set-top box device that can detect a user interaction associated with a remote control proximate to the set-top box device. *See* Abstract.

INVENTION

Claims 1, 11, and 20 are independent. An understanding of the invention can be derived from a reading of exemplary Claim 1, which is reproduced below

1. A method for verifying a user identity, the method comprising the steps of: detecting, by a set-top box device, presses of buttons directed to a television screen by a user via a remote control associated with a television;
storing data indicative of the presses of buttons within a storage device as user interaction data;
conveying the user interaction data from the storage device to a remotely located server;
receiving a response from the remotely located server indicating that a behavior pattern in the interaction data is substantially equivalent to a behavior pattern in previously stored interaction data of a behavior profile of the user for presses of the button;
and
verifying an identity of the user during an e-commerce session from data of the response.

References and Rejections

Darbee, <i>et al.</i> ,	US 4,959,810	Sept. 25, 1990
Cerrato	US 2002/0178257 A1	Nov. 28, 2002
Alie	US 2003/0055738 A1	Mar. 20, 2003
Barbara, <i>et al.</i> ,	US 2003/0105710 A1	June 5, 2003

Jacobson	US 2005/0008148 A1	Jan. 13, 2005
Singh, <i>et al.</i> ,	US 7,873,595 B2	Jan. 18, 2011
Aidasani, <i>et al.</i> ,	US 2013/0030936 A1	Jan. 31, 2013 Filed July 28, 2011

The claims stand rejected as follows:

1. Claims 1–7, 10, and 20–22 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Cerrato, Jacobson, and Darbee. Final Act. 8–16.
2. Claim 8 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Cerrato, Jacobson, Darbee, and Singh. Final Act. 15.
3. Claim 9 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Cerrato, Jacobson, Darbee, and Aidasani. Final Act. 17.
4. Claims 11–19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Cerrato, Jacobson, Darbee, and Alie. Final Act. 17–23.

ANALYSIS

We have reviewed the rejections of Claims 1–22 in light of Appellants’ arguments that the Examiner erred. We have considered in this decision only those arguments Appellants actually raised in the Brief. Any other arguments which Appellants could have made but chose not to make in the Brief are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv). We are not persuaded that Appellants identified reversible error. Upon

consideration of the arguments presented in the Appeal Brief, we agree with the Examiner that all the pending claims are unpatentable. We adopt as our own the findings and reasons set forth in the rejection from which this appeal is taken and in the Examiner's Answer, to the extent consistent with our analysis below. We provide the following explanation to highlight and address specific arguments and findings primarily for emphasis.

Appellants advance various contentions and allegations, including: claimed limitations are not taught in the prior art (Br. 16–22), the *prima facie* case improperly combines non-analogous art (Br. 10–12), the *prima facie* case lacks motivation to combine the prior art (Br. 12–16), and the rejection improperly was made final (Br. 16). We comment on each of Appellants' contentions, but not necessarily in the same ordering as Appellants.

CLAIMS 1–7, 10, AND 20–22: OBVIOUSNESS OVER
CERRATO, JACOBSON, AND DARBEE.

CLAIM 1: OBVIOUSNESS OVER CERRATO, JACOBSON, AND DARBEE.

Recitations not present in claims.

Appellants contend the Examiner finds the Cerrato/Jacobson combination “do[es] not explicitly teach ‘the use of a universal remote control that can be used to control both a TV and a STB’.” Br. 18 (quoting Final Act. 10). Appellants argue the rejection of independent Claims 1 and 20 is improper because the accused recitation does not appear in either claim. *Id.*

The Examiner acknowledges the response to Appellants' prior arguments may have been confusing. Ans. 20. The Examiner finds the Darbee reference [to a universal remote] was included to address Appellants' arguments that a TV could not receive signals from a set-top remote, nor could a set-top receive signals from a TV remote. *Id.*

Appellants chose not to file a Reply Brief. Because Appellants do not address the Examiner's findings regarding the teachings of Darbee, we are not persuaded of error.

Storing data indicative of presses of buttons

Appellants contend the Examiner relies on Cerrato to teach the claimed "storing data indicative of the presses of buttons within a storage device as user interaction data." Br. 18. Appellants argue the claims recite the stored user interaction data is conveyed from the storage device to a remotely located server, but in contrast, Cerrato teaches the raw clickstream is not stored locally, but is sent directly to a remote server. *Id.*

The Examiner finds Cerrato teaches local storage. Ans. 20. We agree. Cerrato teaches: "[t]he database of input pattern profiles and software for detecting and matching current input patterns can reside at the client terminal . . ." Cerrato, ¶ 32. We are not persuaded of error.

Data indicative of the presses of buttons.

Appellants contend the Examiner finds Jacobson (¶¶ 71, 79) teaches various claimed limitations relating to the storage and transmission of data indicative of the presses of buttons. *See* Br. 18. Appellants argue Jacobson

teaches “mouse click feature vectors,” but that such “vectors” are not the same as a press of a button. *Id.*

The Examiner finds Jacobson teaches a similar system wherein a customer is authenticated customer by transmitting feature vectors corresponding to the user input (i.e., presses of the button) to a remote server for comparison against a master database. Ans. 21–22. Because Cerrato uses a set-top-box remote control, consistent with the claimed limitation, the Examiner does not replace Cerrato’s remote control with Jacobson’s mouse. *Id.* at 22. Appellants do not reply. Because Appellants do not address the Examiner’s findings and reasoning, we are not persuaded of error.

CLAIM 5: OBVIOUSNESS OVER CERRATO, JACOBSON, AND DARBEE.

Appellants contend the cited combination fails to teach the further limitation “wherein the presses further comprise at least one input for a fast forward action, a rewind action, and a high definition option.” Br. 19. Appellants argue the Examiner improperly took Official Notice. *Id.*

The Examiner finds Cerrato teaches an infrared remote for a TV. Ans. 24. The Examiner finds at the time of invention, such devices commonly included the claimed control functions. *Id.* Appellants do not reply. Because Appellants do not address the Examiner’s findings and reasoning, we are not persuaded of error.

CLAIM 6: OBVIOUSNESS OVER CERRATO, JACOBSON, AND DARBEE.

Appellants contend Cerrato fails to teach local storage of user interaction data in a set-top box, as claimed. Br. 20. The Examiner finds Cerrato teaches a system comprising a content server and a client set-top

box, but no other servers. Ans. 25. The Examiner finds, in view of Cerrato's disclosure, that the set-top box must be the locus where the clickstreams are stored and compared. *Id.* Appellants do not reply. As discussed above, Cerrato discloses the "database of input pattern profiles and software for detecting and matching current input patterns can reside at the client terminal [i.e., the set-top box]. Cerrato, ¶ 32. We are not persuaded of error.

CLAIM 7: OBVIOUSNESS OVER CERRATO, JACOBSON, AND DARBEE.

Appellants contend the cited art fails to teach JAVASCRIPT is stored and used at the set-top box, as claimed. Br. 20. The Examiner finds Cerrato teaches the data comparison [necessarily requiring software] happens at the set-top box. The Examiner does not specifically refer to JAVASCRIPT, but Jacobson discloses JavaScript. Jacobson, ¶ 72. Appellants do not reply. We are not persuaded of error.

CLAIM 11: OBVIOUSNESS OVER CERRATO, JACOBSON, DARBEE, AND ALIE.

Appellants first contend that the Examiner errs in rejecting Claim 11 for the reasons advanced in favor of Claim 1. Br. 21. In view of our foregoing discussion, we are not persuaded of error. Appellants next contend the Cerrato-Jacobson combination fails to teach the "specific volume and channel profiles," as claimed. *Id.*

The Examiner finds the volume and channel limitations were addressed in the prior Office Action. Ans. 28. Appellants do not reply. However, Appellants' traversal merely argues, without more, that the claimed limitations are not taught. We are not persuaded of error.

CLAIM 12: OBVIOUSNESS OVER CERRATO, JACOBSON, DARBEE, AND ALIE.

Appellants contend Jacobson teaches a mouse, whereas, the claims go to a TV remote. Therefore, Jacobson cannot teach a “behavioral biometric of remote control specific interactions,” as claimed. Br. 21. The Examiner finds Cerrato (TV remote) and Jacobson (mouse) attempt to solve the same problem, namely, biometric analysis of a user’s interaction with a remote controller. Ans. 29. Appellants do not reply. Because Appellants do not address the Examiner’s findings and reasoning, we are not persuaded of error.

CLAIM 13: OBVIOUSNESS OVER CERRATO, JACOBSON, DARBEE, AND ALIE.

Appellants contend the Examiner fails to find the prior art teaches “wherein the user interaction data further comprises user input for a fast forward action, a rewind action, or a high definition option,” as claimed. Br. 22. The Examiner refers to the findings made for Claim 5. Appellants do not reply. Because Appellants do not address the Examiner’s findings and reasoning, we are not persuaded of error.

CLAIM 16: OBVIOUSNESS OVER CERRATO, JACOBSON, DARBEE, AND ALIE.

Appellants contend that Cerrato (§ 91) fails to teach “wherein the adjustments of volume include at least one of a stepwise adjustment and a jump adjustment,” as claimed. Br. 22. The Examiner finds Cerrato teaches capturing the different lengths of time a user depresses a button on a remote. Ans. 30. The Examiner finds holding down the volume button on a remote teaches the claimed “jump adjustment” and the captured time teaches whether the adjustment is a jump or step. *Id.* Appellants do not reply.

Because Appellants do not address the Examiner's findings and reasoning, we are not persuaded of error.

NON-ANALOGOUS ART.

Cerrato, Jacobson, Darbee, and Alie.

Appellants contend that the Examiner's various prior art combinations relate to non-analogous art as defined by *Panduit Corp., v. Dennison Mfg.*, 810 F.2d 1561 (Fed. Cir. 1987); *In re Deminski*, 796 F.2d 436 (Fed. Cir. 1986), and *In re Wood*, 599 F.2d 1032 (CCPA 1979). *See* Br. 10–12.

We note Appellants fail to reference *In re Klein*, the Federal Circuit's more recent guidance. “Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.” *In re Klein*, 647 F.3d 1343, 1348 (Fed. Cir. 2011). We are not persuaded the cited art are from different fields. Moreover, Appellants do not sufficiently persuade us the references are not “reasonably pertinent” to the claims. *See* Ans. 4–7. A reference is reasonably pertinent if it relates to the same problem. *See Klein*, 647 F.3d at 1348.

MOTIVATION TO COMBINE.

Appellants contend the Examiner fails to articulate a proper motivation to combine the various references. Br. 12–16. We are not persuaded in view of the Examiner's extensive findings (*see* Ans. 9–16) to which Appellants fail to reply.

FINALITY OF REJECTION

Appellants “would like the Board to comment on the appropriateness” of the Examiner making the present rejection “Final.” Br. 16.

Any arguments directed towards the “finality” of an office action are subject to petition and not appeal. In that regard, the Board typically does not comment as to whether the finality of the Examiner’s office action is improper. *See* 37 C.F.R. § 1.181; MPEP § 608.04(c); and *In re Mindick*, 371 F.2d 892, 894 (CCPA 1967). The Board lacks jurisdiction to hear issues that “dispute the administrative processing of [a rejection alleged to be procedurally improperly raised during] the prosecution.” The Board insists that “the proper procedure is to seek review by way of petition...” *Ex parte Edwards*, Appeal No. 98-1396 at 4, 1998 WL 1736081 at *2 (BPAI Apr. 27, 1999); *see Ex parte Frye*, 2010 WL 889747, slip op. 7 (BPAI Feb. 26, 2010) (precedential).

DECISION

The rejection of Claims 1–22 under 35 U.S.C. § 103(a) is
AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED